SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 20

OSCAR F. TREICHLER, EXECUTOR OF THE ESTATE OF FRED A. MILLER,

Appellant,

vs.

STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF BY AMICUS CURIAE

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Amicus Curiae

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The technique used by counsel for the appellee, throughout their brief, has been to restate our argument in the manner in which they wish we had stated it in the first place, and then to attack it as so restated. Since in several instances they have placed in our mouths quite the opposite of what we contend, we feel constrained to set forth in this reply brief a resumé of what our contentions really are, and then to indicate to the Court how the appellee's arguments have failed to answer these contentions.

In the first place, we are dealing only with a special type of Wisconsin estate—namely, one where the Wisconsin Normal Taxes and the death taxes paid to other

states aggregate less than the federal 80% credit and where, therefore, the Wisconsin Estate Tax applies. Any statements made by us concerning the effect of Wisconsin tax statutes refer only to their effect on that special type of Wisconsin estate.

We contend that, in such estates, the Wisconsin Emergency Tax is, according to its terms, so computed that its amount is entirely independent of the decedent's Wisconsin estate and is measured instead by the decedent's federal estate which contains his property in all jurisdictions. This result derives inevitably from the fact that the Emergency Tax is equal to 30% of the Wisconsin Normal and Estate Taxes, and the sum of these latter taxes, when levied on such special estates, is always exactly equal to the federal 80% credit less death duties, if any, paid to other states.

Therefore, the Emergency Tax on such special estates is always exactly equal to 24% of the federal basic tax less 30% of the death duties, if any, paid to other states. Since the federal basic tax is measured by the decedent's federal estate, the Emergency Tax is also measured by this federal estate. The decedent's Wisconsin estate does not enter into the final result at all.

When, as in the instant case, the decedent's federal estate contains property outside the taxing jurisdiction of Wisconsin, we contend that a tax measured by that federal estate is measured in part by such property, and is hence in violation of the rule of *Frick v. Pennsylvania*, 268 U. S. 473 (1925).

We do not admit, as the appellant states we do, that the Wisconsin Estate Tax is a valid tax. We contend that, at least in theory, it too is an *ultra vires* tax being measured by the decedent's federal rather than his Wisconsin estate. However, so long as this Wisconsin Estate Tax

does not cause the total taxes paid by the estate to exceed the federal 80% credit, it may be argued that the estate is not required to pay more tax than it has to pay in any event, and that therefore there is no *taking* of property.

We do not, and never have, contended that proper Wisconsin taxes may not exceed the 80% credit. This would be an absurdity, since in most Wisconsin estates the normal tax does exceed this credit. Our contention is that a tax which is levied in part on property outside the state can be saved from invalidity, if at all, only by the fact that it is not levied in excess of that credit. Once such a tax, like the Emergency Tax, is levied in excess of the 80% credit, there is an uncompensated taking of property, and, if the taxpaying estate, like the Miller estate, owns real property outside Wisconsin, the tax falls squarely within the proscription of *Frick v. Pennsylvania*.

In the light of these, our real contentions, we desire now to answer briefly each of the headings of appellee's summary of argument. The following discussion is therefore numbered in accordance with those headings.

I. Appellee states, at page 14 of its brief, that Wisconsin inheritance taxes do not operate to impose any tax extraterritorially, because such taxes cannot be asserted against any property outside the State of Wisconsin. This is immaterial. The same lack of jurisdiction which prohibits the State of Wisconsin from measuring its tax by property outside its jurisdiction may well also prevent it from undertaking collection proceedings against such property; but this is small consolation to the taxpayer, who still has to pay the entire tax out of his property in Wisconsin.

A. We fail to see where there is any question of burden of proof in this case, or any failure to present "clear

and cogent evidence". (See p. 15 of appellee's brief.) The facts of the case are agreed and the statutes involved are set out in full in the briefs. It seems therefore to us that the question is solely one for a decision by the Court based on the agreed facts and the text of the statutes.

B. Appellee claims that "factually there is no extra-territorial taxation in this case". (See p. 18 of appellee's brief.) Appellee's contention in this respect is based on the fallacy that, if a federal tax is measured by property, 87.52% of which has a taxable situs in Wisconsin, and 12.48% of which has a taxable situs outside Wisconsin, this state may import and relevy any portion of this tax, less than 87.52% thereof, and not be taxing property having a situs outside Wisconsin. That is not true. No matter how small a portion of the federal tax is imported and relevied in Wisconsin—even if this portion were only 1/10 of one per cent of the federal tax—the portion so relevied is still measured, 87.52% by the Wisconsin property and 12.48% by the property having a situs outside Wisconsin. The only change has been in the *rate* of the tax, not in its measurement.

A tax is *measured* by property when an increase or decrease in that property causes a corresponding increase or decrease in the tax. The Wisconsin Emergency Tax, being always equal to 24% of the federal basic tax less 30% of out-of-state death duties, if any, responds to increases and decreases in a decedent's *federal* estate, but is unaffected by changes in a decedent's Wisconsin estate so long as the federal estate remains the same. It is, therefore, *measured* by the federal estate which may, and in this case does, contain property having a situs outside Wisconsin.

C. As stated before, we do not and never have claimed that the fact that a state inheritance tax exceeds the federal 80% credit establishes that it is extraterritorial in effect. (See p. 23 of appellee's brief.) What we claim is that a state tax, which *is* extraterritorial in effect, is stripped of the last possible argument for its validity, once it causes the aggregate state taxes to exceed the 80% credit.

D. We have never denied that, if Mr. Miller's entire estate had been in Wisconsin, his total Wisconsin inheritance taxes would have been larger. (See p. 25 of appellee's brief.) All that fact proves is that the State of Wisconsin sometimes taxes property subject to its jurisdiction at a higher rate than that at which it attempts to tax property which lies beyond its jurisdiction. The objection we make is not against the *amount* of the tax, nor against its *rate*, but against its *measurement* by property lying outside Wisconsin.

E. The appellee states at page 27 that "measurement of a tax by factors outside the state does not of itself render a tax extraterritorial". The appellee does not distinguish between the "rating" and the "measurement" of a tax. The rule of *Frick v. Pennsylvania* is that the *measurement* of a tax, directly or indirectly, by property outside a state renders the tax invalid. The appellee cites *Maxwell v. Bugbee*, 250 U.S. 525 (1919), which was distinguished in the *Frick* case, and which holds that a tax may be *rated* in proportion to a decedent's entire estate. But what has been done here is not merely to *rate* a Wisconsin tax, but to appropriate and import into the Wisconsin tax levy a portion of a federal tax which was both rated *and measured* by all the decedent's property, including property outside the state. The property that measures a tax is the property the tax rate is applied to. It must be known to compute

the tax. But to compute the Wisconsin Emergency Tax it is not necessary to have any knowledge of what proportion of a decedent's estate was subject to the taxing jurisdiction of Wisconsin.

F. Appellee argues at page 29 that the "pattern" of Wisconsin inheritance tax statutes is the imposition of taxes only on property within its taxing jurisdiction. We are not concerned here with a mere "pattern". We are concerned with the actual effect of certain tax statutes as construed by the Supreme Court of Wisconsin. The *effect* of the Wisconsin Estate Tax is to insure that there is brought into this state's treasury an amount equal to 80% of the federal basic tax less any taxes paid to other states. The *effect* of the Emergency Tax is to levy a separate tax equal to 30% of this amount. There is no "pattern" in any other tax statutes which can alter the plain fact of these effects.

H. Appellee states at page 32 that the Emergency Tax is not "directly geared" to the federal estate tax, and observes further:

> "This is self-evident. On the contrary it is computed at 30% of the *amount* of two other independent taxes. By its express terms this 'emergency' tax is an amount 'equal to 30 per cent' of the amount of the 'normal' Wisconsin inheritance tax imposed by sections 72.01 to 72.24 and the Wisconsin 'estate' tax imposed by sections 72.50 to 72.61.'

We wish merely to point out that these two other taxes are precisely the "gears" by means of which the emergency tax is caused to be dependent on the amount of the decedent's federal estate and independent of the amount of his Wisconsin estate.

We respectfully submit, therefore, that the appellee does not effectively meet the arguments of the appellant or the supporting arguments of *amicus curiae*.

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